No. 14,110

IN THE

United States Court of Appeals

For the Ninth Circuit

A. L. KAYE,
Plaintiff-Appellant,

vs.

BANK OF FAIRBANKS,
a Banking Corporation,
Defendant-Appellee.

APPELLANT'S BRIEF.

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS OF THE DISTRICT COURT'S JURISDICTION AND THIS COURT'S JURISDICTION TO REVIEW.

The jurisdiction of the District Court for the Territory of Alaska, is provided by Title 48 U.S.C.A., Section 101, reading as follows:

> "There is established a District Court for the District of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; * * *"

The jurisdiction of this Court is provided by the provisions of Title 28 U. S. C. A., Section 1291, reading as follows:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the District Court for the Territory of Alaska, * * * except where a direct review may be had in the Supreme Court."

The decision here appealed from is a final decision as it is a judgment in favor of Defendant and awarding the Defendant attorney's fees and costs (Tr. 38).

The venue of this Court is established by Title 28, U.S.C.A., Section 1294 (2).

STATEMENT OF THE CASE.

On the 23rd day of April, 1952, the Bank of Fairbanks, an Alaskan Banking Corporation, filed a complaint in the District Court for the District of Alaska, Fourth Division, Cause #7114, against A. L. Kaye, Jean Kaye and Josephine Boussard, Defendants, acting by and through its attorney Maurice T. Johnson of Fairbanks, Alaska. The complaint sought the foreclosure of four real and chattel mortgages which were executed by A. L. Kaye and Jean Kaye, and which secured four promissory notes, which notes the Plaintiff Bank of Fairbanks alleged to be past due. The Bank alleged that A. L. Kaye and Jean Kaye were then indebted to it in the approximate amount

of Twelve Thousand One Hundred ($12,100.00) Dollars, plus interest on said amount at the rate of eight (8%) per cent per annum.

The complaint further alleged that Josephine Boussard claimed an interest in the real and personal property, the subject of the mortgages given to secure the promissory notes.

The Bank also sought the recovery of One Thousand Five Hundred ($1,500.00) Dollars as a reasonable attorney fee for Plaintiff Bank's attorney.

On the 25th day of June, 1952, A. L. Kaye and Jean Kaye filed their answer, admitting the execution of the notes and mortgages, but alleging affirmatively that the interest of A. L. Kaye and Jean Kaye in and to the mortgaged property had been acquired by Josephine Boussard with the knowledge and consent of the Plaintiff Bank; and that the said Boussard had, since the 10th day of November, 1953, paid monthly installments of Two Hundred ($200.00) Dollars toward the purchase of said encumbered property and in addition thereto had paid interest on the unpaid balance of the Fifteen Thousand ($15,000.00) Dollars purchase price at the rate of eight (8%) per cent per annum, each of which payments had been applied to the indebtedness of Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank and that said Bank had acceded to said arrangement and had waived its right to foreclose the mortgages as prayed. A similar answer was filed by Josephine Boussard on the 12th day of June, 1952.

On the 23rd day of October, 1952, the Plaintiff Bank did charge the special account of A. L. Kaye and did summarily remove therefrom the sum of One Thousand Four Hundred Eighty ($1,480.00) Dollars, of which amount One Thousand Four Hundred Fifty ($1,450.00) Dollars was alleged by said Bank to have been paid to Maurice T. Johnson, Attorney at Law, as a retainer in the action entitled Bank of Fairbanks, an Alaskan Banking Corporation vs. A. L. Kaye, Jean Kaye and Josephine Boussard, Cause #7114, in the District Court for the District of Alaska, Fourth Division, while Twenty One ($21.00) Dollars was alleged to have been paid by said Bank to the Clerk of the District Court as a filing fee and the remaining Nine ($9.00) Dollars to the United States Marshal for the Fourth Division of Alaska for serving the summons and complaints in said cause (Tr. 10 and 11).

On the 7th day of November, 1952, A. L. Kaye, Plaintiff-Appellant herein, did file in the District Court for the District of Alaska, Fourth Division, Cause #7309, entitled A. L. Kaye, Plaintiff vs. The Bank of Fairbanks, a Banking Corporation, Defendant, thereby seeking the recovery from the Defendant of the One Thousand Four Hundred Eighty ($1,480.00) Dollars removed by the Defendant-Appellee from the Plaintiff's account on the 23rd day of October, 1952, and Plaintiff's costs, disbursements and a reasonable attorney fee (Tr. 3 and 4).

In its answer, the Defendant Bank admitted its existence as a banking corporation and did admit that on the 23rd day of October, 1952, the Plaintiff had on deposit in said Bank the sum of One Thousand Four Hundred Eighty ($1,480.00) Dollars, which was the property of the Plaintiff Kaye.

Said Bank denied that it had converted said One Thousand Four Hundred Eighty ($1,480.00) Dollars to its use and alleged affirmatively that the Plaintiff Kaye was, on the 23rd day of October, 1953, indebted to the Defendant Bank in a sum far in excess of said deposit; and that Defendant Bank had applied the funds on deposit in the name of Plaintiff as part payment of the indebtedness then due and owing by the Defendant to the Plaintiff Bank (Tr. 4 and 5).

This cause was heard before the Honorable Harry E. Pratt, Judge, District Court, District of Alaska, Fourth Division, sitting at Fairbanks, Alaska, on the 8th day of October, 1953.

Mr. Ralph Bailey, vice-president of the Defendant Bank, testified that the special account of A. L. Kaye was charged One Thousand Four Hundred Eighty Dollars ($1,480.00) by said Bank on the 23rd day of October, 1953, and a debit slip evidencing such charge was admitted as Plaintiff's exhibit A (Tr. 10 and 11).

Mr. Bailey further testified that the money which had been removed from the Plaintiff's account was used by the Defendant Bank to pay Maurice T. Johnson, the bank's attorney, for the services performed

by said attorney in instituting cause #7114, the same being entitled, Bank of Fairbanks, An Alaskan Corporation, Plaintiff vs. A. L. Kaye, Jean Kaye and Josephine Boussard (Tr. 12).

Mr. Bailey further testified that Mr. Johnson was the Bank's attorney (Tr. 13); that cause #7114 had not proceeded to judgment, Tr. 14); that Mr. Kaye had not authorized the Bank to employ Mr. Johnson (Tr. 16); that the One Thousand Four Hundred Eighty ($1,480.00) Dollars had not been applied to the debt evidenced by the notes (Tr. 16); that Mr. Kaye received nothing in consideration for the One Thousand Four Hundred Eighty ($1,480.00) Dollars removed from his account (Tr. 17); and that in fact cause #7114, Bank of Fairbanks vs. Kaye, was still pending (Tr. 18 and 20).

Four promissory notes (Defendant's Exhibits 1, 2, 3, and 4) were admitted by the trial Court (Tr. 25-32 incl.), which evidenced the indebtedness of A. L. Kaye and Jean Kaye to the Defendant Bank, each of which notes, according to the testimony of Bailey, was secured by a real and chattel mortgage, which mortgages were sought by the Bank to be foreclosed by cause #7114 (Tr. 21).

The Plaintiff Kaye testified that he had on deposit in the Defendant Bank the sum of One Thousand Four Hundred Eighty ($1,480.00) Dollars on the 24th day of October, 1952; that the Bank did on said day, without authority, charge his account with that amount and did pay same to Maurice T. Johnson, an

attorney in the employ of the Defendant Bank (Tr. 33-34).

That trial Court held that on the 24th day of August, 1952, the Plaintiff Kaye was indebted to the Defendant Bank in the amount of One Thousand Four Hundred Eighty ($1,480.00) Dollars, which amount the Bank had previously paid to its attorney, and that the Bank was entitled to charge the account of the Plaintiff for such amount (Tr. 36).

SPECIFICATION OF ERRORS.

The Appellant specified as error that the Court erred in that its judgment is contrary to the evidence and contrary to the applicable law.

ARGUMENT.

As a general rule a bank may look to deposits in its hands for the repayment of any indebtedness to it on the part of the depositor and may apply the debtor's deposits on his debts to the bank as they become due. See *C. A. Eaton Co. v. L. Mark Shoes,* (DC Pa.), 37 F 2d 715; *Am Bank and Trust Co. v. Morris* (CCA 5th) 16 F 2d 845; *G. D. Harter Bank of Canton v. Inglis* (CCA 6th) 6 F 2d 841, cert. den. 46 S. Ct. 103, 269 U. S. 576; *Corbett et al. v. Klein Smith et al.* (CCA 6th), 112 F 2d 511; 9 C. J. S. 614, §296.

The right of a bank to appropriate the funds of a depositor is limited to the claims of the bank against

the depositor, which are liquidated or susceptible of liquidation by a mere process of calculation. *Thornton v. National City Bank of New York,* (CCA 2d) 45 F 2d 127; 1 Morse on Banks and Banking (6th edition) §335, pp. 779, 780; *Steingut v. Guaranty Trust Company of New York,* 58 F. Supp. 623; 3 C.J.S. 620, §297.

A "liquidated claim" is one which the debtor does not in good faith dispute. *Virginia-Carolina Elec. Works v. Cooper,* 63 SE 2d 717.

An "unliquidated claim" is one the amount of which has not been fixed by agreement or can not be exactly determined by the application of rules of arithmetic or of law, while a "liquidated claim" is the opposite. *State for Use of Warner Co. v. Massachusetts Bonding and Insurance Co.,* 9 A 2d 77.

"Liquidated" means declared by the parties as to amount; *U. S. v. Bethlehem Steel Co.,* 205 U.S. 105; *Maryland Steel Co. v. U.S.,* 235 U.S. 451, 35 S.Ct. 190; or fixed by operation of law. *U. S. v. Skinner and Eddy Corporation,* 28 F 2d 373.

"Liquidated" means made certain as to what and how much is due; made certain by agreement of the parties or by operation of law. *Chicago, Milwaukee and St. PR Co. v. Clark,* 178 U. S. 353, 20 S. Ct. 924; *Parks v. Inter-State Account Services,* 54 F. Supp. 581; *Charnley v. Sibley* (CCA 7th) 73 F 980.

"Liquidated" means that which can be ascertained by computation or calculation from definite data sup-

plied by evidence and does not lie in mere opinion. *Odessky v. Monterey Wine Co.,* 49 S.E. 2d 330.

"Liquidated" connotes settled; adjusted; determined; fixed; made certain; ascertained; agreed upon by the parties; fixed by operation of law. *In re Davis Mfg., Inc.,* 95 F. Supp. 200, 54 C.J.S., Liquidate, p. 564.

It cannot be said that the claim of the Bank against this Appellant was liquidated. Certainly the Appellant did not acquiesce in the employment by the Bank of its attorney and he did not agree under the terms of the notes, to pay anything other than a reasonable attorney fee.

By the tests outlined in the citations above the Bank's claim for attorneys fees does not meet the test of "settled", "adjusted", "determined", "fixed", "made certain", "ascertained", "agreed upon by the parties", or "fixed" by operation of law.

The undisputed testimony of Mr. Bailey and the Appellant show that the Bank had no authority from Appellant to employ an attorney, which want of authority precludes the possibility of privity between Appellant and the Bank in its contract to employ Mr. Johnson.

In the instant case there did exist a claim by the Bank against the Appellant which meets all of the tests of "liquidated." Under the authorities cited above the Bank had a recognized right to apply the proceeds of the account of this Appellant toward the

payment of Appellant's liquidated debt to the Bank, as represented by the four promissory notes introduced in evidence as Defendant's exhibits 1, 2, 3 and 4; however, though there is a conflict in the authorities, it has been held that a bank is not entitled to apply a deposit to a debt of the depositor which is fully protected by collateral. The decisions supporting this theory hold that the bank must show that the security is inadequate. *Forastiere v. Springfield Inst. for Savings,* 20 NE 2d 950; *Seaboard Finance Co. v. Shire,* 218 P 2d 282; *Zions Savings Bank and Trust Co. v. Rouse et al.,* 47 P. 2d 617; *Ossmen et ux. v. Commercial Credit Corporation,* 241 P. 2d 351.

It would appear that the Bank had, prior to the institution of its foreclosure action (cause #4117) concluded that the security for the promissory notes evidencing the indebtedness of Appellant was adequate, the Bank having elected to foreclose the mortgages securing the notes, rather than by waiving the mortgages and proceeding on the notes.

Each of the promissory notes executed by the Appellant and Jean Kaye in favor of the Appellee Bank contained the following provision'' * * * if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought thereon, to pay all costs of collection, including reasonable attorney's fees. * * *''' Had the bank instituted suit on the notes it is doubtful that it could have recovered an attorney fee under the provisions cited without first having introduced evidence as to the reasonable value of the services of the attorney.

It is generally held that attorney's fees can not be allowed where the amount is not stipulated, unless there is proof of the value of the attorney's services. *Getman v. Hayhow,* 229 P. 559, 3 R.C.L. 896, 20 Ann. Cas. 1374 note; *Holland Baking Co. v. Dicks,* 170 P. 253; *Holmes v. S. H. Kress and Co. et al.,* 223 P. 615; *Beindorf v. Thorpe,* 259 P. 242.

Where the amount of the attorney fee is not stipulated the value of such services must be determined by the Court and the burden of proof of value is upon the Plaintiff. 11 C.J. p. 282.

The provision in a promissory note whereby the promisor agrees to indemnify the promisee for attorney fees is limited in amount to such sum as the evidence shows to be reasonable. *Liberty Cent. Trust Co. v. Gilliand Oil Co.,* (D. C. Del. 1923) 289 F. 75.

To sustain the allowance of an attorney fee where the note provides for the payment of attorneys fees if placed in the hands of an attorney for collection, there must be evidence of the value of the services rendered by the attorney. *Mechanics-American National Bank v. Coleman* (1913, CCA 8th) 204 F 24.

The validity of stipulations in promissory notes for the payment of attorney fees in the event of default has generally been upheld, however, *these provisions are sustained only as an indemnity for the reasonable fees necessarily and properly paid or incurred.*

The question of what constitutes a reasonable fee depends upon circumstances of each case.

To guard against possible oppression and injustice this rule must apply. *U. S. v. Reed, U. S. v. Clark, U. S. v. Thompson, U. S. v. Mowell et al.* (1942) 31 A. 2d 673.

There is much authority to support the proposition that a stipulation in a note to pay a percentage of the debt as an attorney fee is subject to judicial scrutiny to insure reasonableness.

Mechanics-American National Bank v. Coleman (1913, CCA 8th) 204 F 24; *Burns v. Scroggin* (1883, CC) 16 F 734; *Best v. British and A Mtge. Co.* (1897, CC) 79 F 401; *Re Harris* (1921, D.C. Pa.) 272 F 351.

CONCLUSION.

The Appellant contends that the law applicable to the instant case is as follows: A bank may properly apply the funds of a depositor to the payment of a liquidated, matured, and unsecured debt due from the depositor to the bank.

An agreement "to pay all costs of collection including reasonable attorney's fees" is not the basis of a liquidated claim.

Here the Appellee Bank elected to institute mortgage foreclosure proceedings and prior to judgment applied approximately One Thousand Five Hundred ($1,500.00) Dollars of Appellant's money to the payment of a fee to the Bank's attorney. The holding of

the trial Court taxes the costs of suit against the Appellant prior to a judicial determination of the merit of Appellee's foreclosure action.

Appellee Bank introduced no evidence tending to establish the reasonableness of the attorney fee charged to Appellant. The trial Court did not find that the attorney fee was reasonable (Tr. 36).

A decision of this Court sustaining the judgment upon which this appeal is based would grant judicial sanction and approval to a course of conduct which would ultimately destroy all faith and confidence in public depositories and thereby precipitate the demise of the American commercial system.

Counsel did not find a case in which a bank possessed and exercised such unmitigated gall as to apply all, or practically all, of the funds of a depositor to the employment and payment by way of retainer of an attorney for the bank, the attorney having been employed for the sole purpose of instituting suit to foreclose mortgages on the depositor's property, such mortgages being secured by promissory notes payable to the bank.

By the employment of the methods here adopted any bank could deplete the cash reserves of a depositor and then proceed to seize and sell with judicial sanction and approval, any collateral held by the bank to secure a past due loan. Such practice could be adopted regardless of the amount of money on deposit or the value of the security held by the bank. The

essential ingredients of such a scheme are (1) an unethical banker motivated by greed, avarice, envy, or deceit and (2) an attorney willing to be a party to such chicanery.

The Courts can not in good conscience countenance a situation so fraught with hazards.

Suffice it to say, however, that Appellant does not here imply dishonesty on the part of the Appellee or its attorney, but has merely attempted to point out the perils incident to appellate approval of the law as enunciated by the trial Court.

Respectfully submitted,

GEORGE B. MCNABB, JR.

Attorney for Plaintiff-Appellant.

Service acknowledged by receipt of copy of the foregoing Brief this 24th day of February, 1954.

MAURICE T. JOHNSON—aac,

Attorney for Defendant-Appellee.